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No. 90-873

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

PAUL F. BORN, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 21 U.S.C. 881(a)(7), which provides for forfeiture of real property used to facilitate commission of a drug offense, requires the government to show that the property was "substantially connected" to drug trafficking.

2. Whether, in affirming the judgment of forfeiture, the court of appeals improperly relied on petitioner Born's unrelated drug conviction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A 1-12)[1] is reported at 903 F.2d 490.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1990. A petition for rehearing was denied on July 16, 1990. Pet. App. B. On October 1, 1990, Justice Stevens extended the time within which to file a petition for a writ of certiorari to Decem-

[1] Because the pages in the appendix to the petition for a writ of certiorari are not sequentially numbered, we have, for present purposes, assigned separate designations to the materials in the appendix. "Pet. App. A" is the opinion of the court of appeals, etc.

ber 13, 1990, Pet. App. D, and the petition was filed on December 3, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed this civil action in the United States District Court for the Northern District of Illinois seeking the forfeiture, pursuant to 21 U.S.C. 881(a)(7), of petitioner Born's one-third interest in a house. After a bench trial, the district court entered judgment in favor of the United States. Pet. App. C. The court of appeals affirmed. Pet. App. A 1-12.

1. The evidence at trial showed that petitioner used his house to conduct telephonic negotiations for cocaine transactions.[2] On February 20, 1986, petitioner met with John Mueller, a state undercover investigator. At that time, petitioner had a record of previous convictions for drug trafficking and weapons offenses. Mueller offered to sell a kilogram of cocaine to petitioner, but petitioner declined the offer because he was in the process of selling a kilogram that he had just purchased. However, petitioner gave Mueller his home telephone number, and the two men agreed to stay in touch with each other. Pet. App. A 2.

On April 15, 1986, Mueller telephoned petitioner at his home and told him that he needed two ounces of cocaine. Petitioner said he could provide that quantity at a price of $1,600 per ounce and told Mueller to call him the next day at petitioner's home to arrange a time and place for the transaction. Mueller complied with petitioner's directions, but the

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[2] Because petitioner Born is the only individual claimant in this in rem action, we shall refer to him as "petitioner."

telephone was answered by Don Mazzanti instead of petitioner. When Mueller said he was calling about buying two ounces of cocaine, Mazzanti said that Mueller should call again later because petitioner was asleep. Later in the day, however, Mazzanti telephoned Mueller and arranged to deliver the cocaine. That night, Mueller and Mazzanti met as arranged, and Mueller gave Mazzanti $3,200 for two ounces of cocaine. Mazzanti told Mueller that this initial delivery was petitioner's way of making sure that Mueller was legitimate. Mazzanti also told Mueller to call petitioner again whenever Mueller needed cocaine. Pet. App. A 2-3.

2. After the United States instituted this action seeking forfeiture of petitioner's one-third interest in the house, petitioner filed a claim to that interest and contested the forfeiture. He argued that the United States could prevail under 21 U.S.C. 881 (a)(7) only if it showed that petitioner's house had a "substantial connection" to drug trafficking. The district court rejected that legal contention, Tr. 67-68, but found in any event that petitioner's house was "clearly used to facilitate the drug business." Tr. 66-67. Accordingly, the district court entered judgment in favor of the government. Pet. App. C 1-2.[3]

3. The court of appeals affirmed the judgment of forfeiture, likewise rejecting petitioner's contention

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[3] The district court's judgment provides that the United States Marshal may offer to sell petitioner's one-third interest in the house to his parents, who own the remaining two-thirds interest. If petitioner's parents decline the offer, the property is to be sold and petitioner's parents will be entitled to two-thirds of the proceeds, after deductions for expenses associated with the sale. Pet. App. A 4 n.3; Pet. App. C 1-2.

that an independent "substantial connection" test must be applied under Section 881(a)(7). Pet. App. A 1-12. The court of appeals pointed out that Section 881(a)(7) broadly provides for forfeiture of "[a]ll real property . . . which is used, or intended to be used, *in any manner or part*, to commit, or to facilitate the commission of [a felony violation of Title 21]." Pet. App. A 5 (quoting 21 U.S.C. 881(a)(7) (emphasis supplied by court of appeals)).[4] In the court's view, this "sweeping" language is "clear, straightforward, and unambiguous," and establishes that "Congress intended to reach all property used to promote the drug trade." Pet. App. A 6. The court explained that "[g]rafting an implied 'substantial connection' test on to the plain language of this statute would not avoid ambiguity or the frustration of the Congressional scheme, but promote them." *Ibid.* Accordingly, the court saw "no reason to read the penalties of this statute more narrowly than the plain language demands." *Ibid.*

The court of appeals pointed out that petitioner in fact "[did] not contend that the addition of this

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[4] Section 881(a) provides in pertinent part:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * * * *
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

'substantial connection' test is necessary to avoid an absurd result or frustration of the statutory scheme." Pet. App. A 6. Instead, petitioner relied on a passage in the Senate Report on the 1984 amendments in which Paragraph (7) was added to 21 U.S.C. 881(a) in order to extend its coverage to real property.[5] A portion of the Senate Report discussing the need for Paragraph (7) explained that under then-current law, there was no provision for forfeiture of real property, even when its use was "indispensable to the commission of a major drug offense." S. Rep. No. 225, 98th Cong., 1st Sess. 195 (1983). Petitioner contended that this passage implied that Congress did not intend the forfeiture statute to apply to property having "only an incidental or fortuitous connection to the drug business." Pet. App. A 7. The court of appeals agreed that "the property must have more than an incidental or fortuitous connection" to drug trafficking, but it did not believe an interpretation more lenient than that was warranted by the passage in the Senate Report upon which petitioner relied. Rather, the court reasoned, the Senate Report was merely citing "some of the more egregious examples created by the loophole in the forfeiture statute" when it did not cover real property. Pet. App. A 7. The court also noted that although "indispensable" is the term used in the Senate Report, even petitioner conceded that an " 'indispensability' requirement would be a misreading of the statute." *Id.* at 7-8.

The court of appeals recognized that two circuits have ruled that Section 881(a)(7) requires a showing of a "substantial connection" to a drug offense.

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[5] See Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 306(a), 98 Stat. 2050.

See Pet. App. A 8-9 (citing *United States* v. *Schifferli*, 895 F.2d F.2d 987, 990 (4th Cir. 1990); *United States* v. *Santoro*, 866 F.2d 1538 (4th Cir. 1989); and *United States* v. *Premises Known As 3639-2nd St., N.E.*, 869 F.2d 1093, 1096 (8th Cir. 1989)). The court below concluded, however, that any difference between its formulation and that of the Fourth and Eighth Circuits is largely "semantic rather than practical," since those courts, in the very decisions cited, had affirmed forfeitures involving only a single use of a house and required no more than a showing that the property made the prohibited conduct less difficult. Pet. App. A 8-9; see *Schifferli*, 895 F.2d at 990; *Premises Known as 3639-2nd St.*, 869 F.2d at 1096-1097.

Applying the language of the statute to the facts of this case, the court below concluded that petitioner's house had been used to facilitate the drug offense. Thus, the court concluded, the connection between the house and the offense was more than "incidental or fortuitous." Pet. App. A 10.[6]

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[6] Judge Flaum concurred. He agreed that the court had applied the correct statutory test and that the facts of this case satisfied the statutory standard, but he believed that there might be situations in which application of the statute would raise Eighth Amendment concerns. Pet. App. A 12.

Because of an "apparent conflict" between the decision below and the decisions of the Fourth and Eighth Circuits, the panel circulated the decision among all judges of the Seventh Circuit, but a majority did not favor rehearing en banc. Pet. App. A 1 n.1.

ARGUMENT

1. The court of appeals correctly affirmed the forfeiture of petitioner's one-third interest in the property, and its holding is consistent with that of other courts of appeals. Petitioner contends (Pet. 8-20) that the court of appeals erred in declining to engraft an independent "substantial connection" test onto Section 881(a)(7) and that the decision below conflicts in this respect with decisions of other courts of appeals. Although some other courts have stated that the property must have a "substantial connection" to drug activities, the court below correctly concluded that the differences in formulation are essentially semantic. In particular, other courts of appeals have made clear that the phrase "substantial connection" merely serves to exclude from forfeiture property that has only an "incidental or fortuitous" connection to the drug offense. The court below specifically agreed with that view of 21 U.S.C. 881(a)(7), but found in the circumstances of this case that the property *did* have more than an incidental or fortuitous connection to drug trafficking. Because the courts of appeals are in fundamental agreement concerning the scope of 21 U.S.C. 881(a)(7), review by this Court is not warranted.

a. As the court of appeals recognized, Pet. App. A 5-6, the text of 21 U.S.C. 881(a)(7) is straightforward and unambiguous. It broadly provides for forfeiture of "[a]ll real property" used "in any manner or part" to commit, or facilitate commission of, a prohibited drug offense. There is no suggestion in this language of an additional statutory requirement that the property be shown to have had a "substantial connection" to drug trafficking. This Court "[has] repeatedly recognized that '[w]hen . . . the

terms of a statute [are] unambiguous, judicial inquiry is complete, except "in 'rare and exceptional circumstances.' " ' " *United States* v. *James*, 478 U.S. 597, 606 (1986) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). The Court has applied that principle in the forfeiture context, noting that "[i]f the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *Russello* v. *United States*, 464 U.S. 16, 20 (1983) (quoting *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). See also *United States* v. *Monsanto*, 109 S. Ct. 2657, 2662 (1989) (giving effect to all-inclusive language of the criminal forfeiture statute, 21 U.S.C. 853(a)(1), that provides for forfeiture of "any" property representing the proceeds of drug transactions).[7] Accordingly where, as here, the government shows that real property was used to facilitate a drug offense, it is properly forfeited to the United States under 21 U.S.C. 881(a)(7).

In arguing that Section 881(a)(7) should be construed to embody an independent "substantial connection" test, petitioner relies (Pet. 15-16) not on the language of the statute but on a passage in the Senate Report that discusses the shortcomings of the pre-1984 statute. The Report noted that there was no provision for civil forfeiture of real property, "even though its use was indispensable to the commission of a major drug offense." S. Rep. No. 225, *supra*, at 195. Petitioner seizes upon the Report's use of the word "indispensable" in arguing that Section 881

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[7] The criminal statute also provides, in language parallel to that in 21 U.S.C. 881(a)(7), for forfeiture of property used to facilitate a drug offense. See 21 U.S.C. 853(a)(2).

(a)(7) should be construed to embody a "substantial connection" test. However, as the court of appeals explained, the passage in the Senate Report upon which petitioner relies merely recited the most egregious consequences of the then-existing loophole that excluded real property from coverage. Pet. App. A 7. It did not purport to contain an exhaustive list of the situations in which Section 881(a)(7) would apply. "[T]he language of a statute * * * is not to be regarded as modified by examples set forth in the legislative history." *PBGC* v. *LTV Corp.*, 110 S. Ct. 2668, 2677 (1990). Moreover, as the court of appeals also pointed out, petitioner in fact does not even urge adherence to the legislative history, because he conceded below that an "indispensability" requirement would be too stringent and distort the statute. Pet. App. A 8. Thus, petitioner fails to point to anything in the legislative history of Section 881(a)(7) that supports an independent "substantial connection" requirement. Consequently, "[t]he fragments of legislative history cited by [petitioner], regardless of how liberally they are construed, do not amount to a clearly expressed legislative intent contrary to the plain language of the statute." *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 75 (1982).[8]

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[8] Petitioner also relies (Pet. 14) on a sentence in the Statement of Managers regarding the Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301(a), 92 Stat. 3777, in which 21 U.S.C. 881(a)(6) was enacted. The sentence states that "it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent." 124 Cong. Rec. 34,671 (1978). Petitioner fails to point out that the remainder of the pertinent paragraph in the Statement of Managers on the 1978 Act explains that this limitation is embodied in the text of the

In sum, the only showing the government must make when seeking civil forfeiture of real property in circumstances such as these is the one expressly required by the text of 21 U.S.C. 881(a)(7)—namely, that the property was used to commit, or facilitate commission of, a drug offense. There is no independent requirement under 21 U.S.C. 881(a)(7) that the government show that the property had a "substantial connection" to a drug offense, and the courts are not at liberty to amend the statute. Of course where, as here, the express statutory requirement is satisfied, the fact that the property was used to facilitate commission of a drug offense might well be said to establish in itself that the property had a substantial connection to the offense. It is quite another thing, however, to set up the phrase "substantial connection" as a separate statutory requirement, as petitioner urges, wholly independent of the term "facilitate" in Section 881(a)(7).

b. Petitioner contends (Pet. 8-13) that the Court should grant review because there is a conflict among the circuits on whether Section 881(a)(7) requires a showing of a "substantial connection" between the

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new Section 881(a)(6) itself. Accordingly, even if we assume, arguendo, that this legislative history of a prior Act is relevant here, the passage petitioner cites undermines his argument that courts should apply a "substantial connection" test under Section 881(a)(7) that is independent of, and in addition to, the express requirement that the government show that the property was used to commit, or to facilitate commission of, a drug offense. The legislative history of the 1978 Act is unilluminating for the further reason that, as the court of appeals noted, Pet. App. A 5 n.4, Section 881(a)(6), unlike Section 881(a)(7), does not contain the broad reference to property that was used "in any manner or part" to facilitate a drug offense.

property and the drug offense. As the court below recognized, the Fourth and Eighth Circuits have concluded that the government must show such a "substantial connection." However, as the court below further recognized, there is no difference in substance between the approaches the various courts have taken.

In *Schifferli*, the Fourth Circuit explained that "[u]nder the substantial connection test, the property either must be used or intended to be used to commit a crime, or must facilitate the commission of a crime. At minimum, the property must have more than an incidental or fortuitous connection to criminal activity." 895 F.2d at 990. Similarly, in *Premises Known As 3639-2nd St., N.E.*, the Eighth Circuit observed that Section 881(a)(7) "requires something more than an incidental or fortuitous contact between the property and the underlying illegal activity, although the property need not be indispensable to the commission of a major drug offense. The statute clearly provides for the forfeiture of property used or intended to be used to commit or facilitate a violation of Title 21." 869 F.2d at 1096.[9] These explanations make clear that the Fourth and Eighth Circuits, like the court below, focus on the statutory standard of whether the property was used to commit, or facilitate commission of, a drug offense—which they regard as the equivalent of a "substantial connection" to the drug offense—and that the operative effect of the "substantial connection" test

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[9] The Eighth Circuit went on to reject the claimant's argument that the government had failed to establish a substantial connection between the house in question and illegal activity, finding that the house had been used "in the commission or facilitation of a narcotics offense." *Id.* at 1097.

is merely to exclude from forfeiture property having only an "incidental or fortuitous" connection to drug trafficking. The Seventh Circuit in this case expressly *agreed* with the proposition that the property must have more than an "incidental or fortuitous connection to the drug business." Pet. App. A 7.

Both the Fourth and Eighth Circuits further articulated the statutory standard by explaining that property is used to "facilitate" a drug offense if it makes the prohibited conduct "less difficult" or "more or less free from obstruction or hindrance." See *Schifferli*, 895 F.2d at 990; *Premises Known as 3639-2nd St.*, 869 F.2d at 1096-1097. The Seventh Circuit in this case expressed agreement with this formulation as well, and indeed relied upon it in explaining why "the differences between this approach and [the Seventh Circuit's] approach appear largely to be semantic rather than practical." Pet. App. A 8-9.[10] For these reasons, there is no genuine conflict

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[10] Petitioner also argues (Pet. 9-12) that review is warranted because other circuits have also adopted the "substantial connection" test under Section 881(a)(7). The First Circuit did state in *United States* v. *Parcel of Land & Residence at 28 Emery Street*, 914 F.2d 1, 3-4 (1990), that it had consistently required a showing of a "substantial connection." But it expressly followed the Fourth and Eighth Circuits in doing so, and it did not suggest that the approach it was taking differed from the one followed in those circuits—which in turn does not differ in substance from that followed by the Seventh Circuit in this case. In fact, the First Circuit quoted, without disagreement, the Seventh Circuit's observation in this case that, in practice, the difference in approach is "blurry at best." 914 F.2d at 4 n.8; see Pet. App. A 9.

United States v. *Property Known As 6109 Grubb Road*, 886 F.2d 618 (3d Cir. 1989) (see Pet. 10), dealt with the distinct question of the requirements of the so-called "innocent owner" defense under 21 U.S.C. 881(a)(7), not with

among the circuits warranting review by this Court.[11]

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the government's burden of proof. *United States* v. *526 Liscum Drive*, 866 F.2d 213 (6th Cir. 1988) (see Pet. 11), dealt with a claimant's standing to challenge a forfeiture. 866 F.2d at 217. The court, in dicta, discussed general principles of forfeiture law, including a "substantial connection" requirement, but that issue was not involved, and the court did not in any event elaborate upon the requirement in a way that conflicts with the application of Section 881(a)(7) in this and other cases. See 866 F.2d at 216. Finally, although petitioner cites (Pet. 12) *United States* v. *Four Parcels of Real Property in Greene & Tuscaloosa Counties*, 893 F.2d 1245 (11th Cir. 1990), for the proposition that the Eleventh Circuit has adopted a "substantial connection" test, that case arose not under Section 881(a)(7), but under Section 881(a)(6), which lacks the "in any manner or part" language of Section 881(a)(7). See note 8, *supra*. Moreover, the Eleventh Circuit recently made clear that the appropriateness of a "substantial connection" test remains open in that circuit, and it observed, quoting the decision below, that the conflict among other courts on that question "may well be 'semantic rather than practical.'" *United States* v. *Approximately 50 Acres of Real Property*, No. 90-5354 (Jan. 10, 1991), slip op. 1208. As petitioner acknowledges (Pet. 9-12), the remaining courts of appeals have either rejected a "substantial connection" requirement or not yet addressed the question.

[11] Petitioner does not dispute the district court's finding, affirmed by the court of appeals, Pet. App. A 10, that the house was "clearly used to facilitate the drug business," Tr. 66-67, and therefore was properly forfeited to the United States under the court of appeals' view of Section 881(a)(7). He does argue (Pet. 17-20), however, that the facts of this case do not satisfy the "substantial connection" test, which he contends imposes a higher standard. Contrary to petitioner's contention, however, there is no difference in substance between the decisions requiring a showing of a "substantial connection" and the decision below. Petitioner's fact-

2. Petitioner also argues (Pet. 20-23) that the court of appeals relied on improper evidence in affirming the district court's judgment. This claim is without merit.

Petitioner complains of the court of appeals' recitation of the fact that he was separately convicted for cocaine trafficking, and that the government then filed the instant forfeiture action in order "to seize the real estate from which [petitioner] was running his cocaine operation." Pet. App. A 3-4. Petitioner correctly points out that his conviction was for activity unrelated to the instant forfeiture, and he claims that the court below relied on the conviction in order to sustain the forfeiture. Petitioner fails to note, however, that the court below mentioned his unrelated conviction only once, in setting out the background of the case, and did not otherwise refer to the conviction. Beyond that, it is clear that the court of appeals did not rely on the fact of petitioner's conviction in any way in affirming the judgment of forfeiture. In-

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bound submission regarding the application of that test in this case therefore does not warrant review.

In any event, for the reasons summarized by the court of appeals, the use of the house in connection with drug trafficking in this case plainly was not "incidental or fortuitous." Pet. App. A 10. Petitioner gave undercover officer Mueller his home telephone number so that Mueller could call him there if he was interested in drug transactions. When Mueller subsequently called petitioner at the house on April 15, 1986, they negotiated the drug transaction that was consummated the next day. Mazzanti, who had answered another call petitioner made to the house, told petitioner that the initial delivery was petitioner's way of feeling out Mueller to make sure he was legitimate, and Mazzanti told Mueller that he should call petitioner again if he needed more cocaine. *Id.* at 2-3, 10. Petitioner thus held out his house as the place where drug transactions were to be initiated.

stead, the court specifically relied on petitioner's and Mazzanti's dealings with Agent Mueller and the cocaine transaction that they negotiated and carried out. See Pet. App. A 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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